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Kentucky Law Journal

Volume 89 | Issue 4 Article 3

2001

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Recommended Citation

Hunter, Nan D. (2001) "Proportional Equality: Readings of Romer," *Kentucky Law Journal*: Vol. 89 : Iss. 4 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol89/iss4/3

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ESSAY

Proportional Equality: Readings of *Romer*

BY NAN D. HUNTER*

One of the great enigmas of equal protection law is *Romer v. Evans*.[1] In finding sufficient power in the rational basis test to invalidate a state constitutional amendment enacted by popular vote, the Supreme Court left legal scholars in its doctrinal dust, puzzled over the answers to multiple questions. Was this a new rational basis test? If so, how could one know when to apply it? Had the standard of review for state acts adversely affecting lesbian, gay and bisexual Americans changed? If so, to what? Had *Bowers v. Hardwick*[2] been overruled? If so, why?

The Court's decision in *Romer* has been read in many ways: as "a culmination of . . . twenty five years of gay rights advocacy;"[3] as "a shift from thick to thin description [of sexual orientation identities], from realism to nominalism;"[4] as a harbinger of judicial minimalism;[5] as an "uninformed adventure[ ] in judicial activism;"[6] as exemplifying a new equal protection jurisprudence based on the co-constitutive nature of rights and classes;[7] as a recuperation of the Bill of Attainder

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[1] Romer v. Evans, 517 U.S. 620 (1996).

[2] Bowers v. Hardwick, 478 U.S. 186 (1986).

[3] Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 951.

[4] Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 439 (1997).

[5] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 53-71 (1996).

[6] Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 10 (1998).

[7] Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209.

clauses;[8] as so unprincipled as to be "essentially fraudulent;"[9] and as too singular to mean much of anything.[10] If professors graded Justices, *Romer* might well receive an incomplete.

Publication of this essay marks the fifth anniversary of the decision, and thus a preliminary assessment is appropriate. Part I examines the text and its progeny, concluding that this analytically cryptic decision has been deeply prolific in some respects, less so in others. Part II identifies what I believe are the four most important structural components of the Court's reasoning: the reversal of categorical inequality, the articulation of a nexus test, the unresolved animus/morality dichotomy, and the silence as to analogy. For each, I analyze how the emerging body of judicial interpretation of *Romer* has incorporated or reshaped the underlying concept. Finally, Part III outlines and critiques at least the preliminary rule of *Romer*, which I call proportional equality.

I. *ROMER* AND ITS PROGENY

A. The Text

In a statewide referendum in 1992, Colorado voters adopted Amendment 2 to the state constitution. Amendment 2 read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[11]

Its effect was to repeal civil rights protections for homosexual and bisexual Coloradans and possibly bar remedies against failure to enforce laws of

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[8] Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203 (1996).

[9] Lino A. Graglia, Romer v. Evans: *The People Foiled Again by the Constitution,* 68 U. COLO. L. REV. 409, 410 (1997).

[10] Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

[11] Romer v. Evans, 517 U.S. 620, 624 (1996).

general applicability, when such failures would be challenged as discriminatory on sexual orientation grounds. In addition, by enshrining this provision in the state constitution, it precluded state or local legislatures from reinstating these civil rights provisions—only for this group—except by the process of constitutional amendment.

The Colorado Supreme Court ruled Amendment 2 unconstitutional on an equality theory, but a very different one from the basis of the U.S. Supreme Court's decision.[12] The state supreme court ruled on political process grounds, holding that the singling out of gay and bisexual persons for a far more difficult process for seeking enactment of a civil rights law was a "fencing out" of a particular minority and unconstitutional for that reason.[13] Relying chiefly on *Hunter v. Erickson*,[14] in which the Supreme Court struck down an Akron ordinance requiring referendum approval before the city could enforce a fair housing law,[15] the Colorado court ruled that Amendment 2 infringed the fundamental right of homosexual and bisexual citizens to participate in the political process.[16]

The United States Supreme Court never reached those grounds. Instead, in a decision remarkable for its combination of soaring rhetoric and slippery doctrine, the Court declared that Amendment 2 was a violation of the equal protection clause "in the most literal sense."[17] It based that holding on two premises.

First, the Court held that the scope and impact of the disability which it imposed rendered Amendment 2 unlawful. "It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."[18]

Second, the Court held that the breadth of the disenfranchisement led to the "inevitable inference"[19] that the purpose of it was "a bare . . . desire to harm a politically unpopular group."[20] The Court declared that a classification cannot be solely "for the purpose of disadvantaging the group burdened by the law."[21] In light of the Court's subsequent decision in

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[12] Evans v. Romer, 854 P.2d 1270, 1276-82 (Colo. 1993), *aff'd on other grounds*, 517 U.S. 620 (1996).

[13] *Id.* at 1282.

[14] Hunter v. Erickson, 393 U.S. 385 (1969).

[15] *Id.* at 392-93.

[16] *Evans*, 854 P.2d at 1284-86.

[17] Romer v. Evans, 517 U.S. 620, 633 (1996).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[21] *Id.* at 633.

Board of Trustees v. Garrett,[22] this principle appears to be limited to findings that hostility was the only or perhaps the dominant purpose of the law. In *Garrett*, the Court held that the mere presence of biases as partial motivations for state decisionmaking "does not a constitutional violation make."[23]

One striking theme of *Romer* is the extent to which the Court focused on the nature of the classification, rather than on the characteristics of the group being classified. That focus grows directly out of the Court's rejection of either the ground upon which the state supreme court ruled or a heightened scrutiny approach. Consider this framing of Amendment 2 from the state's brief:

> [H]omosexuals, like all Americans, deserve equal rights. But nothing about their circumstances, their lifestyle or their political power *rates them as a group* in need of special rights.[24]

What is clear is that the Court went to some lengths to avoid "rating them as a group."

Under the traditional heightened scrutiny analysis, a court must examine the history and characteristics of the group subject to disadvantage. Is there a history of discrimination? Is the defining characteristic unrelated to merit or eligibility? Is that characteristic immutable? Is the group weakened or even powerless in the "pluralist bazaar?"[25] Because the Colorado Supreme Court had once remanded the case for trial on the

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[22] Board of Trustees v. Garrett, 121 S. Ct. 955 (2001).

[23] *Id.* at 964. The statement arose in specific rebuttal to Justice Breyer, who had argued that "[a]dverse treatment that rests upon such motives [as prejudice] is unjustified discrimination." *Id.* at 971 (Breyer, J., dissenting). Two Justices in the five-Justice majority also wrestled with the difference between bias and irrationality in their concurrence: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. . . . [P]rejudice [ ] can stem from indifference or insecurity as well as from malicious ill will." *Id.* at 968 (Kennedy and O'Connor, JJ., concurring).

[24] Reply Brief of Petitioners at 16, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (emphasis added).

[25] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-47 (1985).

constitutional issues,[26] there was a full evidentiary record on these very questions,[27] a far richer basis for their consideration than is normally the case in equal protection litigation. To use the vernacular, however, the Court simply would not go there.

Moreover, had the Court relied on the grounds on which the Colorado Supreme Court ruled and on which the plaintiffs placed primary reliance—the political process theory—that, too, would have led it to analyze many similar questions. The Court could not have made sense of its previous precedents in the political process line of cases without analogizing homosexual and bisexual persons either to racial minorities, as to whom a provision such as Amendment 2 would be invalid, or to public housing tenants, as to whom a roughly similar provision had been upheld.[28] Plaintiffs argued that Amendment 2 treated gay and bisexual Coloradans as an "independently identifiable group," thus bringing it within the zone of political process theory.[29] The state argued that the invalidation of differential processes within the political realm was limited to situations where the targeted group was a suspect class.[30] Those challenging Amendment 2 sought to frame the case as about the use of a suspiciously invidious and tainted mode of classification, while its defenders sought to force the Court into a focus on the nature of the people who fit into that class.[31]

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[26] Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993), *aff'd on other grounds*, 517 U.S. 620 (1996).

[27] *See* Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1062 (1994).

[28] *Compare* Hunter v. Erickson, 393 U.S. 385 (1969) (holding that a city charter amendment preventing city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination without the approval of a majority of voters of the city violated the Equal Protection Clause of the Fourteenth Amendment), *with* James v. Valtierra, 402 U.S. 137 (1971) (upholding amendment to state constitution requiring a majority vote of approval for proposed low-rent housing projects).

[29] Brief for Respondents at 20-21, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

[30] Petitioner's Brief at 11, *Romer* (No. 94-1039).

[31] *See* Matthew Coles, *Equal Protection and the Anti-Civil-Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar*, 55 OHIO ST. L.J. 563 (1994). Coles was the primary architect of the political process theory for the initiative cases. An explicit part of that strategy was to emphasize the classification over the class, which Coles described as the "it's the classification, stupid" approach. *Id.* at 567-68.

The Court took neither path. Its language suggested almost the opposite of an inquiry into archaic stereotypes or an historical edifice of prejudice and discrimination. The Court never alluded to any such history or pattern; its perspective was thoroughly presentist. The Court wrote as if lesbian and gay Coloradans had simply been struck by the lightning of Amendment 2. "Sweeping and comprehensive is *the change in legal status* effected by this law. . . . Homosexuals, by state decree, *are put* in a solitary class. . . . The amendment *withdraws* from homosexuals, but no others, specific legal protection[s]. . . ."[32] A reader from another planet might imagine that "this law" was the first brush that homosexuals ever had with disadvantageous state actions. As Janet Halley put it, "if the same discrimination were inflicted on blondes or burglars, the same conclusion would follow."[33]

Any hints to the contrary are oblique and refer to the decision by local lawmakers to insulate from certain acts of discrimination "an extensive catalog of traits," including, *inter alia*, status attributable to military service or child custody.[34] In the final four paragraphs of the text, the Court concludes that "a bare . . . desire to harm a politically unpopular group"[35] was at work. The Court's exposition of "laws of the kind now before us"[36] frames them as strange, out-of-the-blue and, more to the rhetorical point, irrational. Such laws "raise the inevitable inference" of animus.[37] "Inevitable" could be an allusion to an historical context and pattern of stratification. Here, though, it seems more of a sigh of resignation: what else could anyone think?

In the Court's own placement of the decision into lines of precedent, it drew on both the mighty and the minor. The Court's opening invocation of Justice Harlan's dissent in *Plessy v. Ferguson*[38] was the most stunning rhetorical move in the text, seeming to place *Romer* in the same category of gravitas and import.[39] The decision is also peppered with citations to other canonical texts of equal protection: *Sweatt v. Painter*,[40] the first Supreme Court decision to order racial integration;[41] *Skinner v. Oklahoma*

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[32] Romer v. Evans, 517 U.S. 620, 627 (1996) (emphasis added).

[33] Halley, *supra* note 4, at 441.

[34] *Romer*, 517 U.S. at 629.

[35] *Id.* at 634.

[36] *Id.*

[37] *Id.*

[38] Plessy v. Ferguson, 163 U.S. 537 (1896).

[39] *Romer*, 517 U.S. at 623.

[40] Sweatt v. Painter, 339 U.S. 629 (1950).

[41] *Romer*, 517 U.S. at 633. The relevant portion cited of *Sweatt* itself quoted *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), which prohibited enforcement of racially-restrictive covenants.

ex rel. Williamson,[42] invalidating criminal laws that imposed unequal punishment for equivalent acts;[43] and *Dunn v. Blumstein*,[44] ruling that a state could not deny the right to vote based on status as a new resident.[45] Yet the critical linchpin of its ruling that animus alone can never supply a legitimate government interest is *U.S. Dep't of Agriculture v. Moreno*,[46] a decision involving "hippie communes" that has never carried the same social impact or moral valence as the other cited cases.

Thus, scholars have debated the meaning and import of *Romer v. Evans*. It did not overrule the privacy holding of *Bowers*.[47] It did not apply heightened scrutiny to classifications based on sexual orientation. And it did not find that the purposes which Colorado asserted lay behind Amendment 2—the freedom not to associate or the discretion to determine the most productive allocation of civil rights enforcement resources—were improper or illegitimate (although it found no rational link between them and the challenged law).[48] Yet, as we shall see, it has triggered a major shift in the jurisprudence of sexual orientation. Why? Or, more to the focus of this essay, how?

B. Judicial Readings

Unlike *Moreno*, the hippie commune case, and *City of Cleburne v. Cleburne Living Center, Inc.*,[49] the leading rational basis decision with bite prior to *Romer*, *Romer* is likely to generate a significant number of progeny cases that are its direct descendants. By direct descendants, I mean cases that address the same classification or class at issue in the original case. Hippie commune cases disappeared with bell bottoms (and unlike bell bottoms, never returned). The class disadvantaged in *Cleburne* has had the opposite social experience, but the same result for equal protection law.

Cleburne involved a group home for mentally retarded persons. Five years after it was decided, Congress enacted the Americans with Disabili-

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[42] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[43] *Romer*, 517 U.S. at 634. The relevant portion cited of *Skinner* quoted *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the first recognition that selective enforcement of a neutral law violated the Fourteenth Amendment.

[44] Dunn v. Blumstein, 405 U.S. 330 (1972).

[45] *Romer*, 517 U.S. at 634.

[46] United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[47] Bowers v. Hardwick, 478 U.S. 186 (1986).

[48] *Romer*, 517 U.S. at 635.

[49] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

ties Act,[50] which prohibits discrimination based on disability—including mental retardation—by private as well as public sector actors. Because the statute is considerably more detailed and stringent in its review of disability-based classifications than even *Cleburne*'s view of rational basis, most litigants have invoked statutory grounds when alleging that form of discrimination. As a result, there are few equal protection cases that one would characterize as direct descendants of *Cleburne*.

Sexual orientation discrimination, by comparison, has neither disappeared nor has it been swallowed up in case law interpreting statutes. Eleven states, the District of Columbia and many local jurisdictions have enacted civil rights laws that prohibit sexual orientation as a basis for discrimination;[51] indeed, the Supreme Court has adjudicated two disputes arising under such laws.[52] But there is no federal statute that bars sexual orientation as a ground for discrimination, and thus equal protection-based challenges remain, and are likely to continue to remain, a significant source of litigation. As a result, the body of case law applying *Romer* to other instances of anti-gay state actions—what I am calling the direct descendants—is likely to grow.

What has emerged so far is quite mixed. The single governmental policy of anti-gay discrimination that has led to the greatest number of equal protection challenges is the military's "Don't Ask, Don't Tell" policy.[53] Those lawsuits began before *Romer* was decided and continued until roughly 1999.[54] They were all decided on the ground of deference to

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[50] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101 - 12213 (1994)).

[51] *See, e.g.*, CAL. GOV'T CODE §§ 12920, 12940 (West Supp. 2001); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); HAW. REV. STAT. § 368-1 (1993); MASS. ANN. LAWS. ch. 151B, § 4(1) (Law. Co-op. 1999); MINN. STAT. ANN. §§ 363.03, 363.12 (West Supp. 2001); NEV. REV. STAT. §§ 281.370, 338.125, 610.185, 613.330 (1999); N.H. REV. STAT. ANN. §§ 354-A:7, :8 (Supp. 2000); N.J. STAT. ANN. §§ 10:2-1, :5-4, :5-12 (West 1993 & Supp. 2000); R.I. GEN. LAWS. §§ 28-5-2, 28-5-7 (Supp. 1999); VT. STAT. ANN. tit. 21, § 495 (Supp. 2000); WIS. STAT. ANN. § 111.36 (West 1997); and D.C. CODE ANN. § 1-2512 (1999). For a compendium of the approximately 120 cities and counties with such laws, see WAYNE VAN DER MEIDE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDERED PEOPLE IN THE UNITED STATES passim (1999).

[52] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

[53] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (codified at 10 U.S.C. § 654 (1994)).

[54] *See, e.g.*, Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Thomason v.

military judgment, a distinction that virtually eliminated *Romer* from consideration. *Romer* appears to have had no impact on either outcome or reasoning in these cases.

With regard to equal protection cases outside the military context, however, there has been a profound, although not universal, shift in outcome. Prior to *Romer*, only two federal district court decisions, neither of which was appealed, had found that an anti-gay state action lacked a rational basis,[55] compared to numerous appellate and trial level decisions that had found the rational basis test satisfied.[56] In finding that a school district which had fired a teacher perceived to be gay was entitled to qualified immunity for that act, the Tenth Circuit held that

> Examining the case law as it existed in 1988, we do not find a clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation.
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> . . . .
>
> . . . Although the *Hardwick* Court did not deal with an equal protection claim, for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time, cast enough shadow on the area so that any unlawfulness in Defendant's actions was not "apparent."[57]

Since *Romer*, the trend has run in the other direction. A federal district court denied a qualified immunity defense on the ground that the alleged anti-gay discrimination occurred after *Romer*.[58] There have been two adverse federal cases: the Eleventh Circuit upheld the refusal of a state

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Perry, 80 F.3d 915 (4th Cir. 1996); Thorne v. U.S. Dep't of Def., 945 F. Supp. 924 (E.D. Va. 1996).

[55] Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Swift v. United States, 649 F. Supp. 596 (D.D.C. 1986).

[56] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Dubbs v. CIA, 866 F.2d 1114 (9th Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987); Baker v. Wade, 769 F.2d 289 (5th Cir. 1985); Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (1984); Buttino v. FBI, 801 F. Supp. 298 (N.D. Cal. 1992); Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988); Childers v. Dallas Police Dep't, 513 F. Supp. 134 (N.D.Tex. 1981); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340 (Wash. 1977).

[57] Jantz v. Muci, 976 F.2d 623, 629-30 (10th Cir. 1992).

[58] Zavatsky v. Anderson, 130 F. Supp. 2d 349, 357-58 (D. Conn. 2001).

attorney general to hire a lesbian staff attorney,[59] and the Sixth Circuit upheld a municipal charter amendment similar to Colorado's Amendment 2.[60] The Sixth Circuit, however, also reversed a lower court's dismissal of an equal protection claim challenging an arrest apparently motivated by anti-gay bias.[61] In addition, the Seventh Circuit recognized an equal protection claim by a gay student based on a rational basis test.[62] District courts have used *Romer* reasoning to rule in favor of gay plaintiffs in cases involving employment of gay teachers,[63] harassment of gay students,[64] and harassment of a gay government employee.[65]

Of course, it is far too simple to attribute all change to *Romer*. Given how vague that decision is, one could as easily postulate that a trend toward finding that anti-gay state actions are irrational reflects broad but unsystematic changes in public attitudes toward homosexuality.[66] Indeed, four state appellate courts have ruled since 1996 that distinctions based on sexual orientation trigger heightened scrutiny under various provisions of their state constitutions.[67] To some degree, *Romer*'s reasoning merely reflects the

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[59] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

[60] Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997). In an unusual memorandum accompanying the denial of certiorari, Justices Stevens, Souter and Ginsburg noted that such a denial is not a decision on the merits, and attributed the denial in this case to "confusion over the proper construction of the city charter," coupled with the Court's practice of "not normally mak[ing] an independent examination of state law questions that have been resolved by a court of appeals." Equal. Found. of Greater Cincinnati v. City of Cincinnati, 525 U.S. 943, 944 (1998), *denying cert. to* 128 F.3d 289 (6th Cir. 1997).

[61] Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997), *cert. denied sub nom.* City of Florence v. Chipman, 523 U.S. 1118 (1998).

[62] Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[63] Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Glover v. Williamsburg Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

[64] Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

[65] Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999).

[66] Several such markers were noted by Justice Stevens in his dissent in Boy Scouts of Am. v. Dale, 530 U.S. 640, 663 (2000) (Stevens, J., dissenting).

[67] Baker v. State, 744 A.2d 864 (Vt. 1999) (common benefits clause); Lawrence v. Texas, 2000 WL 729417 (Tex. App. 2000) (sex discrimination), *rev'd*, 2001 WL 265994 (Tex. App. 2001); Tanner v. Or. Health Sci. Univ., 971 P.2d 435 (Or. App. 1998) (equal privileges and immunities); Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996) (recognition of heightened scrutiny in dicta), *aff'd*, 950 P.2d 1234 (Haw. 1997).

extent to which society as a whole had begun to question the legitimacy of anti-gay practices. On the other hand, it seems silly to deny that by amplifying that skepticism in *Romer*, the Supreme Court shifted the weighty thumb of state power on the discursive scale in a fundamental way.

II. THE STRUCTURAL COMPONENTS OF *ROMER* REASONING

One of the paradoxes of the Court's decision in *Romer* is the contrast between the simplicity of what we understand as the normal rational basis test and the complications of the Court's deployment of it in the opinion. Although the Court speaks in somewhat simplistic language—referring, for example, to Amendment 2 as a "literal" violation of the equal protection clause[68]—that simplicity is misleading. *Romer*'s reasoning is multidimensional, not linear, in the way that it alters the logic of equal protection analysis. There is no one key to understanding its impact on sexual orientation jurisprudence. Its impact derives from four inter-related aspects of its reasoning.

A. The Reversal of Categorical Inequality

It used to be that every analysis of sexual orientation law began with *Bowers v. Hardwick*.[69] It often *ended* there as well. The most important result of *Romer v. Evans* was that it reversed the shadow holding of *Bowers*.

In *Bowers*, the Court ruled that the fundamental right of privacy did not protect private consensual acts of oral or anal sex when engaged in by homosexuals.[70] The Court was silent as to the reach of the law when heterosexuals engaged in the same acts, at least outside of marriage. Because no fundamental right was at issue, the Court then assessed the validity of the Georgia sodomy statute by use of a rational basis test and held that Georgia's expressed position that "homosexuality" was immoral constituted a sufficient rational basis.[71] The majority evidenced no discomfort in its analytic slippage, such that the Court moved from analyzing "sodomy between consenting adults in general, or between homosexuals in particular,"[72] to, ultimately, "homosexuality."[73]

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[68] Romer v. Evans, 517 U.S. 620, 633 (1996).
[69] Bowers v. Hardwick, 478 U.S. 186 (1986).
[70] *Id.* at 195-96.
[71] *Id.* at 196.
[72] *Id.* at 190.
[73] *Id.* at 196.

Despite the absence of an explicit equal protection analysis or holding in *Bowers*,[74] lower federal courts read it as a presumption in favor of state actions penalizing lesbians and gay men.[75] The logic of these decisions, restated vigorously by Justice Scalia in his *Romer* dissent,[76] was persuasive. Under *Bowers*, homosexual sexual conduct could be criminalized. When the state used a sexual orientation classification, homosexual sexual conduct was "the conduct that define[d] the class," as the D.C. Circuit held in a decision upholding the dismissal of a lesbian FBI agent.[77] If a government could sentence persons in that class to imprisonment because of their sexual conduct, surely it could also deny them any positive benefits, such as jobs, based on their membership in that conduct-defined class. It appeared to be a simple application of the principle that the greater penalty of criminalization necessarily includes the lesser one of civil penalties.[78]

Federal courts after *Bowers* and before *Romer* read *Bowers* this way.[79] Consider the 1988 dissenting opinion of Ninth Circuit Judge Reinhardt in the panel decision in *Watkins v. United States*.[80] Despite his disagreement with *Bowers*, Reinhardt concluded that heightened scrutiny could not be applied to classifications based on sexual orientation and that the rational basis standard did not invalidate the military's policy of excluding gay persons.[81] Reinhardt felt compelled by its logic to conclude that *Bowers* was a case "about 'homosexuality,' " not "about 'sodomy.' "[82] "The anti-homosexual thrust of *Bowers*, and the Court's willingness to condone anti-

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[74] The Court did not actually write anything about the impact of its decision on equal protection analysis, other than a footnote observing that no equal protection issues were before it. *Id.* at 196 n.8.

[75] *See infra* notes 79-83 and accompanying text.

[76] *Romer*, 517 U.S. at 640-43 (Scalia, J., dissenting).

[77] Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[78] Lynn Baker has pointed out that this proposition is not as self-evident as it first appears. Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 389 (1997).

[79] *E.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir.1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989); *Padula*, 822 F.2d at 103; Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

[80] Watkins v. United States, 837 F.2d 1428, 1451 (9th Cir. 1988) (Reinhardt, J., dissenting).

[81] *Id.* at 1455.

[82] *Id.* at 1452.

homosexual animus in the actions of the government, are clear."[83] Had *Romer* been the law in 1988, Reinhardt could not have reached the same conclusion.

Under the pre-*Romer* approach, any state could single out lesbians and gay men and treat them as presumptive felons. Thus, it did not seem like much of a stretch to argue that a state could, if it wished, erect a bar against extending civil rights protections to that same group of persons. This was much less severe than criminalization, and it targeted the same group. *Ipso facto*, Amendment 2 was constitutionally permissible, at least on a facial equal protection claim.

The *Bowers* era of categorical inequality (as opposed to the *Hardwick* ruling on substantive due process) ended when the Court ruled that Amendment 2 could not survive even a rational basis test.[84] But because the *Romer* Court did not even mention *Bowers*, much less analyze its reasoning, the *Romer* dissenters were given a free pass to argue that the majority had ignored controlling precedent.[85] Sympathetic commentators also were left to guess at how to read the two decisions in tandem, resorting to attempts to write "the missing pages" that the *Romer* majority failed to include.[86]

The gap in reasoning does weaken the persuasive power of the decision. But one problem facing the *Romer* majority was that it drew partly from the logic of one of the *Bowers* dissents. Whether it was done consciously, I obviously cannot say. But the dissent of Justice Stevens in *Bowers*,[87] read together with his articulation of a meaningful rational basis test in *Cleburne*,[88] pre-figures the reasoning of *Romer*.

In *Bowers*, Stevens had argued that the question before the Court was essentially one of selective enforcement of a generally applicable sodomy law. First he made the seemingly self-evident point that the class of citizens being disadvantaged had the same interest in liberty rights as other citizens.[89] Given that, "[a] policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group."[90] By

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[83] *Id.* at 1453.

[84] Romer v. Evans, 517 U.S. 620, 632 (1996).

[85] *Id.* at 640 (Scalia, J., dissenting).

[86] *See, e.g.*, Baker, *supra* note 78, at 389; Sunstein, *supra* note 5, at 68-69.

[87] Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

[88] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

[89] *Bowers*, 478 U.S. at 218.

[90] *Id.* at 219.

examining the inconsistency and illogic of Georgia's enforcement, he concluded that morality could not satisfy that test.

In *Cleburne*, Justice Stevens, joined by then Chief Justice Burger, expressed his belief that the three-tiered system of suspect, intermediate and rational basis review misconstrued equal protection analysis.[91] In truth, he said, the Court seeks to "apply a single standard in a reasonably consistent fashion."[92] The difference between the always fatal outcome under strict scrutiny and the sometimes fatal outcome under intermediate review occurred "because the characteristics of these [intermediate review] groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve."[93] Stevens found that the zoning decision at issue in that case failed a rational basis test, when that test was properly applied.[94]

The Stevens philosophy of equal protection led to his refusal in *Bowers* to award a blanket imprimatur for anti-gay practices and to his articulation in *Cleburne* of the basis for the meaningful rational basis test later used by the Court in *Romer*. Drawing so heavily from a dissent without reversing the prior decision seems illogical, but, in fact, it was not. The key is that Stevens was dissenting from the *Bowers* Court's shadow holding on equal protection, not from its substantive due process holding. (The substantive due process dissent in the case was written by Justice Blackmun; the dissent of Justice Stevens did not address the scope of the privacy right except in equality terms.) But citing Stevens as a major source of the majority's reasoning presumably would have forced Justice O'Connor, who had joined the majority in *Bowers*, off the majority in *Romer*, and might also have troubled Justice Kennedy, who wrote *Romer* but was not a member of the Court at the time of *Bowers*.[95]

The impact of the reversal of the categorical inequality reasoning that *Bowers* generated has been dramatic. Since *Romer*, three governmental actors have attempted to invoke categorical inequality to justify discrimina-

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[91] *City of Cleburne*, 473 U.S. at 452.

[92] *Id.* (quoting Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring)).

[93] *Id.* at 454.

[94] *Id.* at 455.

[95] Nor can one assume how Justices Souter, Ginsburg, and Breyer—all of whom joined the Court after *Bowers*—would have ruled on the questions presented in *Bowers*, although it is now evident from the dissent they joined in *Dale* that they hold it in low regard. Boy Scouts of Am. v. Dale, 530 U.S. 640, 663 (2000) (Stevens, J., dissenting).

tory acts, and in all three cases, the defense has been rejected.[96] Moreover, the phrase that conveyed the heart of that approach—"the conduct that defines the class"—has disappeared from the case law. Since *Romer*, not a single court has quoted it, or cited the decision in which it was used, in support of the "greater includes the lesser" proposition for justifying anti-gay actions.

B. The Nexus Test

In jettisoning the categorical inequality logic, the *Romer* Court substituted a nexus test. Although the predictive value of homosexual status as an indicator of the likelihood of engaging in homosexual conduct still stands, the Court rescinded the power of the conduct to define the classification, if not the class. Put another way, the class-defining conduct justifies the classification only with respect to that conduct. The Court held that it would "insist on knowing the relation between the classification adopted and the object to be obtained."[97] It is this nexus between means and ends that "gives substance to the Equal Protection Clause."[98]

Thus, under *Romer*, the interest of the state in regulating conduct *circumscribes* the authority to classify by bounding the resulting classificatory discretion to laws that directly relate to that prohibitable, i.e., sexual conduct. When other conduct is being regulated, the state cannot continue to simply invoke its purpose for criminalizing the sexual conduct. Laws that regulate the group of persons who engage in X activities, when they engage in Y activities, must have an independent, Y-related justification. Smokers may not have a constitutional right to engage in smoking, but they cannot be fired from their jobs as schoolteachers because they do.

All post-*Romer* case law to date has accepted this nexus test. Even the two courts that have upheld anti-gay acts also found that the nexus test was satisfied. The Eleventh Circuit acceded to the test rather than endorsing it, but it nonetheless ruled that there was a direct link between the public's reaction to an attorney representing the state who engaged in conduct prohibited by state law and the operation of the attorney general's office.

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[96] Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997), *cert. denied sub nom.* City of Florence v. Chipman, 523 U.S. 1118 (1998); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); Tester v. City of New York, 1997 U.S. Dist. Lexis 1937, at *19-20 (S.D.N.Y. 1997).

[97] Romer v. Evans, 517 U.S. 620, 632 (1996).

[98] *Id.*

That link sufficed to justify revoking that specific job offer.[99] The Sixth Circuit ruled that an amendment to Cincinnati's City Charter had a "direct, actual, and practical" relationship to voter concerns about the expenditure of city funds for enforcement of anti-discrimination ordinance provisions covering sexual orientation.[100] The court distinguished this from the same rationale offered and rejected as support for the Colorado provision at issue in *Romer*, on the ground that the statewide voters there could not rationally be concerned with the consequences of the municipal laws that were being repealed, which were being enforced solely by municipal agencies.[101]

Other courts have taken the principle farther. The district court in *Weaver v. Nebo School District* overturned the reassignment of a lesbian coach because the school board did not offer a "job-related justification" for its action.[102] The court found that defendants had not "demonstrated how Ms. Weaver's sexual orientation bears any rational relationship to her competency as teacher or coach, or her job performance as coach."[103]

The court specifically rejected the defendant's argument that their concern about the negative reaction of some parents to the presence of a lesbian coach supplied the necessary nexus. The court held that "[i]f the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational," and under *Romer* cannot provide a legitimate basis for the action.[104] The power of the nexus test in this case is especially dramatic because the locale was a public school district in Utah, a state with a sodomy law essentially identical to the one upheld in *Bowers*.[105]

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[99] Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997). The court framed this as a status-conduct distinction rather than a nexus test. That distinction also grew out of *Bowers*. *See* Cammermeyer v. Aspin, 850 F. Supp. 910, 918 (W.D. Wash. 1994). It has not survived in other post-*Romer* case law, however.

[100] Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997).

[101] *Id.*

[102] Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998).

[103] *Id.*

[104] *Id.*

[105] *Compare* UTAH CODE ANN. § 76-5-403 (1999), *with* GA. CODE ANN. § 16-6-2 (1984). The Georgia statute, insofar as it criminalizes private, unforced, noncommercial sexual acts between consenting individuals, was found unconstitutional by the Georgia Supreme Court, relying on the right of privacy in the state constitution. Powell v. State, 510 S.E.2d 18 (Ga. 1998).

A district court in Ohio ordered reinstatement of a gay teacher after finding that the board's reasons for firing him were pretextual and that the true reason was his sexual orientation.[106] There the defendant argued that the decision was based on other reasons, but it also asserted that the "tensions and hostilities" that would develop because of moral objections to homosexuality could impair a gay teacher's ability to function and, thus, would supply a rational basis for firing him.[107] The court did not accept that as a legitimate rationale because the teacher "had established that he was an above average first-year teacher who was more qualified than the woman chosen by the Board to replace him."[108] Again, the court required a specifically job-related rationale.[109]

It is likely that the criteria for a nexus will be drawn more tightly by some courts than by others. So far, at least, outside the context of criminal prohibitions, morality has not sufficed. The logic previously derived from *Bowers*—that because morality sufficed to justify criminalization, it would suffice for other and lesser penalties—has been discarded.

C. The Animus-Morality Dichotomy

The third remarkable ingredient of the *Romer* decision was its willingness to classify a penalty directed at lesbians and gay men as evidence of animus rather than of morality. In other words, in addition to discrediting morality as the justification for a particular action of the state because there was an insufficient nexus between moral concerns and the object of that state practice, the Court was also willing to characterize at least some condemnation as animus rather than morality at all.[110]

It was perhaps this aspect of the decision, more than any other, that drove Justice Scalia to a furious dissent. He resented the implication that animus toward homosexuality is "unAmerican,"[111] drawing the traditional distinction between sin and sinner. No person should be hated, he argued, "[b]ut I had thought that one could consider certain conduct reprehensible . . . Surely that is the only sort of 'animus' at issue here: moral disapproval

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[106] Glover v. Williamsburg Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998).

[107] *Id.* at 1174 n.23.

[108] *Id.* at 1174.

[109] *Id.*

[110] Romer v. Evans, 517 U.S. 620, 632 (1996).

[111] *Id.* at 644 (Scalia, J. dissenting).

of homosexual conduct."[112] If that is true, then all Amendment 2 did was "prohibit[ ] favored status *for homosexuality*."[113]

Justice Scalia raises fair questions. Is there no distinction between "animus" and "morality" except the value judgments of a given court? Justice Scalia argued that no principled basis existed for the Court to disallow morality as a legitimate state interest in this case when it had accepted it in others.[114] Moreover, the Court has continued since *Romer* to accept morality as sufficient justification for criminal laws.[115] In Scalia's view, the decision was ultimately grounded in nothing more than a transformation in attitudes about homosexuality among the cultural elite.[116]

This problem is not new to equal protection theory. Noting that "[o]ne person's 'prejudice' is, notoriously, another's 'principle,' "[117] Bruce Ackerman observed that "[t]he difference between the things we call 'prejudice' and the things we call 'principle' is in the end a substantive moral difference."[118] Cass Sunstein described the term "prejudice" as "a conclusion masquerading as an analytic device . . . The claim of irrationality disguises the necessary moral argument."[119]

Reading the majority and the dissent reinforces the impression of a zero-sum game, if not a sleight of hand. Animus and morality exist in the text of *Romer* as a dichotomous name game. A court will elect to "find" one or the other. They are mutually exclusive labels for the same set of beliefs.

Although I might prefer to declare that Justice Scalia got it right insofar as he interpreted the meaning of the Court's decision to be that "traditional moral values" had been relabeled as animus and thus largely eliminated as an acceptable justification for anti-gay laws, I do not read the decision so broadly. When the majority condemned "a bare . . . desire to harm a politically unpopular group" as always constituting animus and never supplying a legitimate justification for a law,[120] it merely identified as

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[112] *Id.*

[113] *Id.*

[114] *Id.* at 644-49.

[115] *See, e.g.*, City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1402 (2000).

[116] *Romer*, 517 U.S. at 652.

[117] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737 (1985).

[118] *Id.* at 740.

[119] Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 4-5 (1994).

[120] *Romer*, 517 U.S. at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

improper the most extreme manifestation of opprobrium. When Justice Scalia defended Amendment 2 as "designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans,"[121] he sought to identify a different legislative purpose: deterring homosexuality. The Court left unanswered whether harm and deterrence are meaningfully different. One could argue that there is also a third possible purpose behind actions of the state, arguably different from either of those two: the promotion or privileging of heterosexuality.

Romer neither accepts nor rejects deterrence and privilege as legitimate purposes of the state. Rather, it focuses on the breadth of the impact of Amendment 2 as the telltale sign of the desire to harm, rather than to discourage or reward.[122] For such a wide-ranging disadvantageous law to be so concentrated on this one group, the Court says, is to impose second-class citizenship, something contrary to our traditions as well as our law.[123] For Scalia, such a law operates merely as deterrence of "the conduct that defines the class."[124] For the majority, its excessiveness crosses the line from deterrence into, as Scalia would deny it, spite.

By recognizing that Amendment 2 imposed penalties on a group, the Court implicitly accepted that there was a group identity or status that existed independently of the conduct in which members of the group presumably engage. This acceptance in itself refutes the totalized approach of letting the conduct (completely) define the class. The logic of the decision goes one step farther, however. The Court's logic flips the question; the most relevant aspect of the conduct versus status debate becomes not how gay people are defined, but what the law being challenged seeks to target. "Conduct versus status" becomes a question to ask about the legitimacy of the law, not of the group. If the law directly prohibits conduct, it may well stand, so long as *Bowers* stands. If its aim is to disadvantage the group, however, it cannot rely for its justification on conduct that is only indirectly discouraged.

Put differently, the state can encourage or discourage specific conduct of many sorts, whether what is universally decried, for example, physical assault, or what is widely accepted, for example, abortion.[125] But government cannot denigrate citizens based on their membership in social

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[121] *Id.* at 653.

[122] *See id.* at 627-31.

[123] *Id.* at 633.

[124] *Id.* at 641.

[125] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193-94 (1991).

groups.[126] Whether the effect is deterrence or promotion, there must be some rational end to the state's policy independent of disapprobation toward a group of persons.

The lower courts have yet to grapple with this problem because most cases to date have concerned claims growing out of actions directed against individuals because of their sexual orientation, rather than challenges to formal classifications embodied in legislation. Several of the cases have involved incidents of violence or harassment, for which hostility toward lesbians and gay men seems to have been intrinsic.[127] As the Sixth Circuit put it, since "the desire to effectuate one's animus toward homosexuals can never be a legitimate governmental purpose, a state action based on animus alone violates the Equal Protection Clause."[128] By contrast, the same court also said, "almost every statute [including a formal classification] can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny."[129]

A challenge to a same-sex only sodomy law based on the equal protection clause would test the logic of *Romer* by applying it to a statute prohibiting conduct, but utilizing a classification based solely on status. Although such a statute would be far narrower in its impact than Amendment 2—imposing no broad swath of disabilities "across the board"—it would present a sexual orientation classification in its starkest, most irrational form. Such laws selectively punish one group of persons as against another when the conduct in which they engage is the same.[130]

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[126] One can also express this idea as either a rejection of second-class citizenship, *see* Sunstein, *supra* note 5, at 63; or as a rejection of "the view that some citizens have less value as persons than others," *see* Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 U.C.L.A. L. REV. 453, 499 (1997).

[127] Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997), *cert. denied sub nom.* City of Florence v. Chipman, 523 U.S. 1118 (1998); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999).

[128] *Stemler*, 126 F.3d at 873-74.

[129] *Id.* at 874.

[130] Such laws arguably constitute another literal violation of the equal protection clause, which at a minimum guarantees "the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (holding that state could not impose sterilization on persons convicted of three felonies by counting grand larceny but excluding

A pre-*Romer* decision grounded in the equal protection provision of the Kentucky state constitution illustrates what would be the analysis. The Kentucky Supreme Court accepted that "*all* sexual activity between consenting adults outside of marriage violates our traditional morality. The issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference."[131] Noting that "[w]e do not condone the immorality of such activity,"[132] the court nonetheless found the statute unconstitutional on the ground that the sole legislative purpose of the classification was "to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform."[133]

A Texas appeals court, however, sidestepped *Romer* entirely in upholding a same-sex sodomy law. In *Lawrence v. State*, the court limited the holding of *Romer* to the principle that laws creating greater burdens on the efforts of one group of citizens to seek enactment of anti-discrimination laws violated the equal protection clause.[134] The court found that *Romer* "provide[d] no support" for the challenge to the Texas statute because, unlike Amendment 2, the sodomy law did not "encumber [plaintiffs'] right to seek legislative protection from discriminatory practices."[135]

No other court has read *Romer* so narrowly.[136] Given the further appeal of the Texas case, and the existence of other same-sex sodomy statutes in states where challenges are underway or possible,[137] it seems likely that this

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embezzlement, another felony involving theft, from the necessary count).

[131] Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1992).

[132] *Id.* at 501.

[133] *Id.*

[134] Lawrence v. State, 2001 WL 265994, at *4 (Tex. App. 2001).

[135] *Id.*

[136] By contrast, the dissent in *Lawrence* found *Romer* to be dispositive. *Id.* at *22.

[137] For announcement of the appeal in *Lawrence*, see http://www.lambdalegal.org/cgi-bin/pages/documents/records?record=807. Other states with same-sex only sodomy statutes are Arkansas, Kansas, and Missouri. ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. STAT. ANN. § 21-3505 (1995); MO. ANN. STAT. § 566.090 (West 1999). The Arkansas statute is currently being challenged; a trial court found it unconstitutional under the Arkansas state constitution. Picado v. Jegley, No. CV 99-7048, Cir. Ct. Pulaski Cnty., Ark. 6th Div. (Mar. 23, 2001). An intermediate appellate court upheld the Kansas statute. City of Topeka v. Movsovitz, No. 77,372 (Kan. App. 1998) (unpublished). A mid-level appellate court in Missouri declared that state's statute unconstitutional. State v. Cogshell, 997 S.W.2d 534 (Mo. Ct.

category of cases will provide a continuing body of interpretation of *Romer* generally and of the specific question of whether the equal protection rule in that case will, in practical terms, overturn the rule of *Bowers v. Hardwick* in at least some sodomy challenges.

D. Silence as to Analogy

"In holding that homosexuality cannot be singled out for disfavorable treatment," Justice Scalia wrote in his *Romer* dissent, "the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[138]

Scalia's protestation implicitly alludes to footnote 4 in *Carolene Products*, the famous dictum in which the Court said that its normal deference to legislative enactments would be suspended if laws "directed at particular religious, or national, or racial minorities" were tainted by "prejudice against discrete and insular minorities."[139]

Given the profound impact of race on American law and of American law on building the structures of racial subordination, it is no surprise that the benchmark for the most stringent equal protection scrutiny is race. Thus the comparison to race when any other group seeks greater anti-majoritarian protection from the judiciary is inevitable. The Supreme Court has compared to racial discrimination the experiences of other groups to whom it has extended a heightened form of scrutiny of the characteristic marking the group, for example, gender[140] and illegitimacy.[141]

Under rational basis review standards, however, there is no need for the comparison. Eliminating the comparison has a particular resonance for sexual minorities that it does not have for other non-racial minorities who might also seek heightened review. The civil rights movement seeking racial equality was heavily grounded in the religious community. Many movement leaders (both African-American and white) were members of the clergy.[142] In addition, political as well as religious leaders embraced

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App. 1999). In addition, Oklahoma has a sodomy statute that, as enacted, covers both opposite-sex and same-sex acts, but which has been limited by judicial interpretation to the latter. Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986).

[138] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

[139] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[140] Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

[141] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972).

[142] *See, e.g.*, DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 97 and passim (1986); NATIONAL RESEARCH COUNCIL, COMMISSION ON BEHAVIORAL AND SOCIAL

equality as an openly moral claim. Opponents of the 1964 Civil Rights Act protested that it was an attempt to "legislate morality" by declaring which social mores were right and which were wrong.[143] Because of these associations, one reason underlying resistance to extending equal rights to a sexual minority is that it is a *sexual* minority.

The tension between gay rights arguments and the analogy to race rose to a new level of prominence in 1993.[144] During that year's debate over the military's policy of excluding homosexuals, contestation over this analogy sharpened significantly, in part because gay advocates invoked the example of President Truman's executive order desegregating the military in 1948 as their primary precedent and in part because of the central role played by General Colin Powell, Chairman of the Joint Chiefs of Staff.[145] Powell virtually embodied African-American pride, and his rank symbolized the hard-won recognition of "masculine" virtues in African-American men. Thus he was an especially powerful advocate for the view that race and sexual orientation are fundamentally different, not analogous.

The correctness of this particular analogy continues to generate strong debate and critiques of the various positions.[146] Its complex cultural reverberations might well make many judges hesitant to declare a winner. The *Romer* Court's use of a rational basis test, with its accompanying

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SCIENCES AND EDUCATION, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald David Jaynes and Robin M. Willliams, Jr., eds.) 173-76 (1989); and TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, 3, 575, 737-42, 785, 879 (1988).

[143] LESLIE A. CAROTHERS, THE PUBLIC ACCOMMODATIONS LAW OF 1964: ARGUMENTS, ISSUES AND ATTITUDES IN A LEGAL DEBATE 67-69 (1968).

[144] *E.g.*, Lena Williams, *Blacks Reject Gay Rights Fight As Equal to Theirs*, N.Y. TIMES, June 28, 1993, at A1.

[145] Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Debates about the "Don't Ask, Don't Tell" Policy*, *in* BLACK MEN ON RACE, GENDER AND SEXUALITY 283 (Devon W. Carbado ed., 1999).

[146] *See, e.g.*, Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115 (David Kairys ed., 3d ed. 1998); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994); Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

mooting of the question of analogy, took the "race versus sexuality" debate out of equal protection law, at least for the moment.

III. PROPORTIONAL EQUALITY

Together, the four structural components of the Court's reasoning in *Romer* have produced what I will call the principle of proportional equality. It is not a new test or an additional tier in equal protection jurisprudence. I would describe it as a metric that is implicit under any of the existing tests but which is most sharply revealed in judicial logic when it does not coincide with either strict or heightened scrutiny.

Romer may seem radical, but that is largely because of the radicalism of the categorical inequality rule that preceded it. It is better read as reasserting a basic sense of proportionality in the assessment of classifications that fall outside the economic realm, where the greatest judicial deference attaches, but which also do not match the traits for which the Court has formally declared heightened or suspect scrutiny. A classification that is extreme in the weight of the penalty that results or in the degree of disconnection between it and the legislature's or agency's legitimate purpose must be examined with great care.

Its strength is, of course, its shortcoming. It is vague or flexible, depending on your taste. One cannot be sure of the kinds of discriminatory practices for which it will be an important part of the analysis. It quite plainly applies in cases where the state does not assert morality as a justification for a classification: Colorado did not in *Romer*, and that has not been the rationale asserted by defendants in any of the post-*Romer* cases. One practical result of *Romer* may be that the types of legislation for which morality can furnish a viable justification have been effectively limited to criminal law.[147]

Perhaps the biggest unknown is the extent to which *Romer* will play any significant role in family law. Facially discriminatory statutes or policies are common in the law of marriage and adoption. To date, courts have not used *Romer*'s proportionality principle to measure the sufficiency of such asserted state interests as the protection of children, but instead have found that a child-focused rationale provided adequate justification for adverse treatment of lesbians and gay men.[148]

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[147] Lawrence v. State, 2001 WL 265994 (Tex. App. 2001); Commonwealth v. Paris, 1999 WL 1499542 (Va. Cir. Ct. 1999) (upholding sodomy law not limited to same-sex partners).

[148] *See* Weigand v. Houghton, 730 So. 2d 581, 593 (1999) (McRae, J., dissenting). *Cf. In re* Adoption of T.K.J., 931 P.2d 488, 496 (1997) (no equal protection violation in denying co-parent adoption on ground that lesbian partners

There are various reasons why *Romer* reasoning has been absent from these cases. The only same-sex marriage case decided by an appellate court since *Romer* was grounded in state law, and never reached an equal protection analysis.[149] In cases involving denial of partner benefits or of standing to bring a wrongful death claim, courts reasoned that the ground of differentiation was marital status, not sexual orientation.[150] Under federal equal protection principles, one must show that the discrimination alleged was intentional; disparate impact claims are not cognizable.[151]

In the even larger category of custody and adoption cases, courts have traditionally ruled based on the welfare of the child, rather than the rights of a parent. In cases involving lesbian or gay parents, a number of courts have permitted homosexual orientation to weigh against a parent only if the opposing party can demonstrate a nexus between it and adverse effects on the child.[152] Other states, however, have ignored or rejected the nexus requirement, reasoning that such harm was obvious and thereby subject to judicial notice and to judicial discretion in the evaluation of its effect.[153] *Romer* has not figured in the analysis of courts reaching either outcome.

The obvious caveat to this point is that courts rarely consider the equal protection aspects of *any* custody case. Other than *Palmore v. Sidoti*,[154] in which the Supreme Court invalidated a custody determination based on the

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were not married). In *Zavatsky v. Anderson*, 130 F. Supp. 2d 349 (D. Conn. 2001), the court denied a motion to dismiss an equal protection claim made by the lesbian partner of a mother whose child was placed in foster care. The partner alleged that state officials had refused to consider her role in raising the child when ordering the foster care placement, and then denied her visitation. Plaintiff alleged that she would have been treated differently under the state's own internal policy had they been a heterosexual couple. The court held that a conclusory assertion that the action had lacked a rational basis could not survive a motion to dismiss decided in light of the lenient rational basis test, but found that the allegation that the state violated its own policy provided a sufficient ground to deny the motion to dismiss. *Id.* at 357.

[149] Baker v. State, 744 A.2d 864 (Vt. 1999). The Hawaii marriage challenge was mooted by an amendment of the state constitution limiting marriage to opposite-sex partners. Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (summary disposition).

[150] *See, e.g.*, Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998); Rutgers Council of AAUP Chapter v. Rutgers, 689 A.2d 828 (1997).

[151] Washington v. Davis, 426 U.S. 229 (1976).

[152] *See, e.g.*, Boswell v. Boswell, 721 A.2d 662 (Md. 1998); Knotts v. Knotts, 693 N.E.2d 962 (Ind. App. 1998); Inscoe v. Inscoe, 700 N.E.2d 70 (Ohio App. 1997).

[153] *See, e.g., Ex Parte* J.M.F., 730 So. 2d 1190 (Ala. 1998).

[154] Palmore v. Sidoti, 466 U.S. 429 (1984).

race of a parent's partner, custody law has generally provided that equal protection principles are off the table. It is true that this principle renders the silence as to *Romer* unsurprising. Yet it is also true that denial of child custody based on sexual orientation is probably the single most brutal penalty under law, short of actual incarceration, that can be (and frequently is) visited on lesbian and gay Americans.

If we suspend for a moment what we know as lawyers about doctrinal categories, the picture that emerges is of the family and its concomitant status categories as an institution similar to the military in the extent to which courts defer to the judgment of others, at least when the relevant issue is sexual orientation. Thus, the development of the "gay family" as both social reality and cultural perception is all the more important.[155] Indeed, widespread recognition of the concept of a "gay family" contradicts the reasoning of *Bowers* as powerfully as does the text of *Romer*. Emblematic of the *Bowers* Court's approach was its language in distinguishing previous privacy cases, finding "[n]o connection between family, marriage and procreation on one hand, and homosexual sodomy on the other."[156] The absence of equal protection reasoning in family law speaks less to doctrine or the need for a doctrinal intervention, than to the embedded nature of anti-gay social practices in the domestic realm.

CONCLUSION

Toni Massaro has called for lesbian and gay rights litigators to use rational basis analysis because it is a "thin" doctrinal approach, providing more openings for the use of reason and narrative and imposing fewer doctrinal hurdles—such as satisfying the traditional criteria for suspect classification—than the thicker approach of seeking heightened scrutiny.[157] I see *Romer*, as deployed by the lower courts in its first five years, as more promising than simply thin. Indeed, it may prove to be neither thick nor thin, but nonetheless extremely fertile.

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[155] *See* Jane S. Schacter, *"Counted Among the Blessed": One Court and the Constitution of Family*, 74 TEX. L. REV. 1267 (1996).

[156] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[157] Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).